

UNITED STATES TAX COURT
WASHINGTON, DC 20217

WE THE PEOPLE FOUNDATION FOR)	
CONSTITUTIONAL EDUCATION, INC., ET)	
AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 20998-10 L, 20999-10 L
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

ORDER

Respondent's motions for summary judgment, filed September 8, 2011, in each of these section 6330(d)¹ consolidated cases were denied by orders dated February 22, 2012. Consistent with at least one of the reasons for the denials of those motions, a partial trial was conducted in order to establish whether either petitioner received, within the meaning of section 6330(c)(2)(B), a notice of deficiency so as to preclude either petitioner's entitlement to challenge the existence or the amount of the underlying liabilities subject to the collection actions here in dispute.

Considering the evidence introduced by the parties at the partial trial, and taking into account other matters established in the record, we find as follows:

1. At all times relevant, petitioners' principal place of business (home office) was located at 2458 Ridge Road, Queensbury, New York (Ridge Road), which was also the residence of Robert Schulz, the founder and an officer of each petitioner.
2. Before 2008, Robert Schulz, as an officer of each petitioner, represented petitioners in connection with respondent's examination of each petitioner for 2003.
3. The focus of the examinations apparently involved, at least in part, the status of each petitioner as an exempt organization pursuant to section 501(c)(3).

¹Section references are to the Internal Revenue Code of 1986, as amended, in effect for the relevant period.

4. On July 3, 2007, Robert Schulz, as the “Chairman” of each petitioner signed a Form 872, Consent to Extend the Time to Assess Tax, which extended to December 31, 2008, the period of limitations for the assessment of Federal income and excise taxes due from each petitioner for the taxable period ended December 31, 2003.

5. On December 29, 2008, the section 501(c)(3) status of at least one, if not both petitioners, was “retroactively revoked to January 1, 2003”.

6. On December 29, 2008, respondent issued a timely notice of deficiency to each petitioner (deficiency notices) determining a deficiency in the 2003 Federal income tax of each petitioner. Each deficiency results from the revocation or termination of the section 501(c) status of each petitioner. Nothing in the record suggests that as of December 29, 2008, the last known address, within the meaning of section 6212, of either petitioner was other than Ridge Road.

7. On January 2, 2009, a contract delivery driver for the United States Postal Service (USPS) left two USPS Forms 3849, Delivery Notice/Reminder/Receipt (Forms 3849), in petitioners’ mailbox at Ridge Road, advising each petitioner that a piece of certified mail was available for pick up at the Glen Falls Post Office in Glen Falls, New York.

8. As it turned out, the pieces of mail to which the Forms 3849 related were the deficiency notices.

9. At the time the Forms 3849 were place in petitioners’ mailbox, and for an extended period afterwards, Robert Schulz was traveling on business away from Queensbury, New York.

10. While Robert Schulz was traveling, Michael F. Bodine, also an agent of each petitioner, was present at petitioners’ home office. He was there from December 28, 2008, through “the middle of February 2009”, and between those dates he “only occasionally” left Ridge Road. While at Ridge Road Mr. Bodine performed numerous and various services for each petitioner, including collecting petitioners’ mail.

11. Robert Schulz instructed Mr. Bodine not to sign for any certified mail delivered to Ridge Road while he (Robert Schulz) was traveling on business.

12. According to Mr. Bodine, it was “certainly possible that * * * [he] brought a notice of certified mail being available for pick up at Glen Falls post office to * * * [Robert Schulz’s] attention when * * * [they] talked on the phone on one of any numerous phone conversations that occurred” during the relevant time, but Mr. Bodine could not “recall any such specific conversation”.

13. The deficiency notices were never claimed by anyone on behalf of either petitioner, and each of the deficiency notices was returned to respondent in the envelope in which it was mailed. Each envelope was stamped “refused” by an employee of the USPS. Neither petitioner commenced a section 6213 proceeding in this Court in response to the deficiency notices.

14. The collection actions involved in this proceeding relate to unpaid assessments (underlying liabilities) made as a result of the issuance of the deficiency notices. See sec. 6213(c).

Section 6330(c)(2)(B) provides that in proceedings such as this one, a taxpayer may challenge the existence or the amount of the underlying liability only if, as relevant here, the taxpayer did not “receive a notice of deficiency” with respect to that liability. The deficiency notices mailed to petitioners were returned to respondent and obviously not actually received by petitioners. Actual receipt, however, of a notice of deficiency is not necessary; a taxpayer’s behavior can give rise to constructive receipt, and constructive receipt of a notice of deficiency is sufficient to preclude a taxpayer’s entitlement to challenge the existence or the amount of the underlying liability in a section 6330(d) proceeding. See Sego v. Commissioner, 114 T.C. 604, 610 (2000).

According to petitioners, they took no action that would amount to constructive receipt of the deficiency notices. They point out that Robert Schulz was traveling at the relevant time, and he did not refuse to pick up the deficiency notices. According to petitioners, the envelopes showing that the deficiency notices were “refused” were stamped in error by the USPS; according to petitioners, they should have been stamped “unclaimed”.

Under the circumstances, we attach little significance to the “refused” stamp shown on the envelopes in which the deficiency notices were mailed. We also attach little significance to where Robert Schulz was located as of the date the Forms 3849 were placed in petitioners’ mailbox. After all, the deficiency notices are not addressed to him, and he is not a petitioner in this proceeding.

We find it more significant that at the time the deficiency notices were issued and mailed, and as of the date the Forms 3849 with respect to the deficiency notices were placed in petitioners’ mailbox, petitioners had an agent at their home office, and that one of that agent’s responsibilities was to collect petitioners’ mail while Robert Schulz was traveling. The fact that the agent was not authorized by petitioners to sign for certified mail is tantamount to a deliberate failure to claim the deficiency notices, and that deliberate failure constitutes receipt, albeit constructive, of the deficiency notices within the meaning of section 6330(c)(2)(B). See Campbell v. Commissioner, T.C. Memo. 2013-57, at *15.

That being so, and to reflect the foregoing, it is

ORDERED that petitioners are not entitled to challenge the existence or the amount of the underlying liabilities in this proceeding. In order to resolve any remaining issues, it is further

ORDERED that these consolidated cases are set for further trial at a special trial session of the Court scheduled to begin at 10:00 a.m. on Wednesday October 30, in courtroom 206, Jacob K. Javits Federal Building, 26 Federal Plaza, New York, New York 10278. It is further

ORDERED that the terms and conditions set forth in the Court's Standing Pretrial Order previously served upon the parties remain in full force and effect.

(Signed) Lewis R. Carluzzo
Special Trial Judge

Dated: Washington, D.C.
April 19, 2013